2003

Brittney Fenn v. MLeads Enterprises, Inc. and John Does 1-10 : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH APPELLATE COURT

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BRITTNEY FENN, on behalf of herself, and all others similarly situated, Plaintiff/Appellant, vs. MLEADS ENTERPRISES, INC., and JOHN DOES one through ten whose true names are unknown, Defendants/Appellees.	:	Appellate Case No.: 20030948-CA District Court Case No.: 030400108 PRIORITY NO.: 15

APPELLANT BRITTNEY FENN'S
OPENING BRIEF ON APPEAL

Appeal from the Order of the Third District Court,
Salt Lake County, Sandy Division, The Honorable Judge Denise P. Lindberg

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APPELLANT'S BRIEF

Appellant, Brittney Fenn, submits this brief in the appeal before this Court.

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

The Plaintiff-Appellant:

> Brittney Fenn, on behalf of herself and all others similarly situated ("Fenn").

The Defendant-Appellee:

> MLeads Enterprises, Inc., and John Does one through ten whose true names are unknown ("MLeads").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Court Cases and Other Authorities

JURISDICTION OF APPELLATE COURT

The jurisdiction of all appellate courts "shall be provided by statute."[1] Section 78-2-2(3)(j) of the Utah Code, provides that: "The Supreme Court has appellate jurisdiction ..., over orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction[.]"[2] This is an appeal from the final judgment of the Third District Court in a civil matter, and although it has original appellate jurisdiction, the Supreme Court has transferred this matter to the Court of Appeals pursuant to § 78-2-2(4) and § 78-2a-3(2)(j), which provide that the Supreme Court may transfer any matter over which it has original appellate jurisdiction.

ISSUES PRESENTED FOR REVIEW

1. Whether jurisdiction over a non-resident is conferred by Utah's Unsolicited Commercially and Sexually Explicit Email Act, Utah's Long Arm Statute, or some other manner for the sending of an email which violates the Act.

2. Whether the lower court committed error by dismissing this case for lack of personal jurisdiction.

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[1] Utah Const., Article VIII, § 5.

[2] Ut. Code Ann., § 78-2-2(3)(j) (1953, as amended).

STANDARD OF REVIEW

This Court should review the legal conclusions of the trial court (since this was a summary judgment it was resolved *in toto* upon legal conclusions) for correctness. "Generally, we review a trial court's legal conclusions for correctness, according the trial court no particular deference." *Wilson Supply, Inc. v. Fradan Mfg. Corp.*, 2002 UT 94, P 11, 54 P.3d 1177, 1181 (quoting *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998)).

This Court should review the statutory interpretations of the Third District Court for correctness. "We review the district court's statutory interpretations for correctness." *Davis County Solid Waste Mgmt. v. City of Bountiful*, 2002 UT 60, P 9, 52 P.3d 1174. "We look first to the statute's plain language as evidence of the legislature's intent, and give effect to that plain language unless the statute is ambiguous." *Id.* at P 10. "We analyze the language of a statutory provision in light of other provisions within the same statute or act, and we attempt to harmonize the provisions in accordance with the legislative intent so as to give meaning to each provision." *Id.*

The standard for granting a motion to dismiss requires the Court to determine that there is no state of facts which might be proven that would allow Plaintiff to any kind of relief. See, *e.g.*, *Heiner v. S. J. Groves & Sons Co.*, 790 P.2d 107 (Utah. App. 1990); *Educators Mut. Ins. Ass'n. v. Allied Property & Cas. Ins. Co.* 890 P.2d 1029 (Utah 1995). Further, all allegations contained in the Plaintiff's pleadings must be accepted as true, and all inferences drawn in favor of Plaintiff when deciding the matter. See, e.g., *Colman v.*

Utah State Land Bd., 795 P.2d 622 (Utah 1990); *Anderson v. Dean Witter Reynolds, Inc.* 841 P.2d 742 (Utah App. 1992); *Prows v. State*, 822 P. 2d 764 (Utah 1991). "When the court rules on a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing, a plaintiff need only make a prima facie showing of personal jurisdiction to defeat the motion. *Rainy Day Books, Inc. v. Rainy Day Books & Café, L.L.C.*, 186 F. Supp. 2d 1158 (D.Kan. 2002). With that standard in mind, Plaintiff's complaint should not be dismissed as Defendant's have failed to show there is no state of facts which would allow Plaintiff to the relief sought.

APPLICABLE RULES AND REGULATIONS TO APPEAL

There are none.

STATEMENT OF THE CASE

Nature of the Case:

This case involves the sending of an unsolicited commercial email by MLeads Enterprises, Inc.. (Defendant/Appellee/MLeads) to Brittney Fenn (Plaintiff/Appellant/Fenn) for which Fenn brought this action in accordance with the Unsolicited Commercial and Sexually Explicit Email Act found in Utah Code Annotated §§ 13-36-101 to 13-36-105 (2002) (the "Statute"). This is a case of first impression.

Course of Proceedings and Disposition Below:

Fenn filed this action in the Third District Court, Sandy Division on January 3, 2003 alleging that MLeads sent or caused to be sent to Fenn an unsolicited commercial email in violation of the Statute. *See* Court Record (Ct. Rec.) p. 1-4. On April 4, 2003, MLeads filed its Motion to Dismiss for Lack of Personal Jurisdiction, with supporting memoranda and the Affidavit of Shay Tyler. See Ct. Rec. p. 8-32. On April 16, 2003, Fenn filed her memorandum in opposition to motion to dismiss. Ct. Rec. p. 53-64. Defendant filed it's reply memorandum on April 21. 2003. See Ct. Rec. p 65-72.

Without hearing, the lower court entered it's Memorandum Decision and Order Granting Defendant's Motion to dismiss on Jurisdictional Ground on October 14, 2003. See Ct. Rec. p. 84-91. The lower court found that there was not proper jurisdiction and therefore granted Defendant's motion to dismiss. See Ct. Rec. p. 84-91.

Fenn filed her Notice of Appeal on November 14, 2003 (Ct. Rec. pp. 95-97) with the Utah Supreme Court which subsequently transferred this matter to this Court.

Facts established in the Record below:

1. On or around August 28, 2002, Ms. Fenn received an unsolicited email sent by or at the behest of Defendant. The email advertised an opportunity for a free quote on a home mortgage refinance. See Ct. Rec. p. 4.

2. The email did not have the characters: "ADV:" on the subject line. See Ct. Rec. p. 4.

3. Ms. Fenn has never had any business or personal relationship with MLeads Enterprises, Inc.. See Ct. Rec. p. 55.

4. MLeads generates leads with respect to loans to purchase property, and then transmits those leads on a bulk basis to financial institutions who then work with customers to provide loans. See Ct. Rec. p. 29.

5. These leads are generated by the sending of commercial emails. See Ct. Rec. pp. 4, 29, 55.

6. MLeads never denied sending the email sent to Brittney Fenn, rather they admit to having sent or caused it to be sent. See Ct. Rec. p. 29-30.

7. MLeads advertises in the State of Utah. See Ct. Rec. pp. 4, 29, 55.

SUMMARY OF ARGUMENTS

1. Section 13-36-101, et seq., commonly known as the Unsolicited Commercial and Sexually Explicit Email Act, itself provides a party who has received emails in violation of the requirements of that statute the ability to bring an action against the entity who sent or caused to be sent that email. Pursuant to the statute, jurisdiction is at least implied by providing a party with the ability to bring that action.

2. Even if jurisdiction is not provided by Section 13-36-101, et seq., it is properly found against the Defendant in this case by Utah's long-arm statute, found in § 78-27-24 of the Utah Code, because there are sufficient minimum contacts and subjecting Defendant to jurisdiction where it sends its emails does not offend "traditional notions of fair play and substantial justice." Jurisdiction should therefore be properly found in this case.

ARGUMENT

1. The Statute Itself Confers Jurisdiction Against Its Violators.

The lower court erred in not conferring jurisdiction through Utah's Unsolicited Commercially and Sexually Explicit Email Act. Utah Code Ann. § 13-36-101 *et seq.* Section 13-36-105 of the Utah Code provides that "[f]or any violation of a provision of Section 13-36-103, an action may be brought by: (a) a person who received the unsolicited commercial email ... with respect to which the violation under Section 13-36-103 occurred[.]"

The defendant in this case fits directly within the confines of these provisions. The defendant sent, or caused to be sent an unsolicited commercial email through the intermediary of an email service provider. If he violated the provisions of the code, he availed himself of the jurisdiction here. It is difficult to imagine that the statute would not provide jurisdiction, especially given the language of the statute indicating the ability to bring an action. There is no qualification of jurisdiction, there is no qualification of meeting the requirements of a long-arm statute. It simply states that for any violation, an action may be brought. *Id.* The only logical inference is that jurisdiction is at least impliedly authorized by the statute. The lower court erred in this respect.

2. Even Without the Provisions of the Statute, This Court has Personal Jurisdiction Over the Defendant.

The Utah Supreme Court recently clarified the requirements for finding personal jurisdiction over a foreign defendant in Utah in, *State ex rel. W.A.* 2002 UT 127. In that decision the Utah Supreme Court explained that:

> "The proper test to be applied in determining whether personal jurisdiction exists over a nonresident defendant involved two considerations. First, the court must assess whether Utah law confers personal jurisdiction over the nonresident defendant. This means that a court may rely on any Utah statute affording it personal jurisdiction, not just Utah's long-arm statute. Second, assuming Utah law confers personal jurisdiction over the nonresident defendant, the court must assess whether an assertion of jurisdiction comports with the due process requirements of the Fourteenth Amendment."

Id. at ¶ 14. Not only does the language of the email statute appear to confer jurisdiction, defendant's actions also subject him to jurisdiction through Utah's long-arm statute. Utah's long-arm statute is found in Section 78-27-24 of the Utah Code Ann. and provides in relevant part that:

> "Any person,... whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdictions of the courts of this state as to any claim arising out of or related to:
>
> (1) the transaction of any business within this state; ...
> (3) the causing of any injury within this state whether tortious or by breach of warranty[.]"

Utah Code Ann. §§ 78-27-24(1), (3). The "transaction of business within this state" is defined as "activities of a nonresident person, his agents, or representatives in this state which affect persons or businesses within the state of Utah." Utah Code Ann. § 78-27-23(2).

"The Utah Supreme Court has applied a 'liberal and expansive construction' to the statutory definition of transacting business." *Patriot Systems, Inc. v. C-Cubed Corp.*, 21 F. Supp. 2d 1318, 1323 (D. Utah 1998) (*citing Nova Mud Corp. v. Fletcher*, 648 F.Supp. 1123, 1126 (D. Utah 1986)). Defendant's actions clearly place him within the reach of this statute. Just with a review of the email and website directed to by the email, it is obvious that he has attempted to obtain new Utah customers. It is most probable that he already engages in sales within Utah, a fact which can be determined through discovery. Even if not already conducting business, Defendant has caused injury to the plaintiff, as evidenced by the violation of the Unsolicited Commercial and Sexually Explicit Email Act. This should be enough to place him within the reach of the long-arm statute.

Additionally, the placement of the offending email was entirely commercially driven and meant to transact business within the state. See Ct. Rec. p. 32, 54-59. This, alternatively, should be enough to subject the defendant to personal jurisdiction within this state. There has been no denial that the email was sent to and received by at least the named plaintiff in the State of Utah. This fact must have been accepted as true for the lower court's decision. The nature of the offending email was entirely commercial in nature. See Ct. Rec. p. 54-59. This also, is not in dispute. This fact alone places the defendant and his actions within the reach of the long-arm statute.

Furthermore, because long-arm statutes typically extend to the limits of due process, the Court need only consider whether exercising jurisdiction over defendants would be

consistent with the Due Process clause of the Fourteenth Amendment. See Utah Code Ann. § 78-27-22. The Tenth Circuit uses a twofold inquiry to determine whether it is appropriate to exercise specific personal jurisdiction over a nonresident defendant through the due process analysis. See *Rainy Day Books* at 1162. "First, the court must determine whether the defendant has such minimum contacts with the forum state "that he should reasonable anticipate being haled into court there." *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). "Within this inquiry the court must determine whether the defendant purposefully directed its activities at residents of the forum. (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, , 476 (1985)), and whether the plaintiff's claims arise out of or result from "actions by the defendant himself that create a substantial connection with the forum State." *Id.* (citing *Asahi Metal Indus. Co., Ltd., v. Superior Court of California*, 480 U.S. 102, 109 (1987)). "Second, if the defendant's actions create sufficient minimum contacts, the court must consider whether the exercise of personal jurisdiction over defendant offends 'traditional notions of fair play and substantial justice.'" *Id.* at 1162 (citing *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091 (10th Cir. 1998)).

A. There are Minimum Contacts.

These requirements have now been applied to situations very similar to this, where a plaintiff has sought jurisdiction over a nonresident defendant because of actions that occurred over the Internet. In this vein, courts in Utah have acknowledged that "a website

may form the basis of personal jurisdiction." *iAccess, Inc. v. WEBcard Technologies, Inc.*, 182 F. Supp. 2d 1183, 1186 (D. UT 2002). Courts have also found that "[e]ven a single contact can support specific jurisdiction." *American Eyewear, Inc. v. Peeper's Sunglasses and Accessories, Inc.*, 106 F. Supp. 2d 895, 900 (N.D. Tex. 2000). To find personal jurisdiction over such contacts as were made in this case, courts in Utah "analyze the level and type of activity conducted on the website in question to determine jurisdiction." *iAccess* at 1186. "A passive website that does no more than make information available cannot by itself form the basis of jurisdiction." *Id.* (citations omitted). Defendant's website and the offending email are clearly not passive. See Ct. Rec. p. 54-59. The emails sent by the defendant to the plaintiff's email address are obvious solicitations to do business. *Id.* "Personal jurisdiction, however, is established where a 'defendant clearly does business over the Internet[.]'" *iAccess* at 1187 (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* 952 F. Supp. 1119, 1124 (E.D. Pa. 1997)).

In this case, defendant clearly was attempting to do business over the Internet. See Ct. Rec. p. 4, 29, 59, 88. The email sent to plaintiff was a direct and obvious solicitation to do business addressed to and received by a Utah resident and personal jurisdiction should have been found for that solicitation. *Id.* That is enough minimum contacts to satisfy the requirement. The U.S. Supreme Court evaluated this matter through a "stream of commerce" theory in *Asahi Metal Indus. Co., Ltd., v. Superior Court of California*, 480 U.S. 102 (1987). In that case, the U.S. Supreme Court stated:

> "The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, **advertising in the forum State, establishing channels for providing regular advise to customers in the forum State, or marketing the product through a distributor who has agreed to serve as a sales agent in the forum State.**"

Id. at 107 (emphasis added). This is exactly what defendant's email was, advertisements in solicitation of commercial transactions. See Ct. Rec. p. 4, 29, 59, 88. The U.S. Supreme Court used that as evidence of purposeful availment in *Asahi*, and it should have been used as evidence of the same in this matter.

It is unknown the amount of business the defendant carries on with Utah residents. What is known is that they at least solicit business from Utah residents. See Ct. Rec. p. 4, 29, 59, 88. Even if the amount of business defendant does is small, courts have used a relatively low threshold to find personal jurisdiction. The 6th Circuit Court in *CompuServe, Inc. v Patterson*, 89 F.3d 1257 (6th Cir. 1996), granted personal jurisdiction over a Texas defendant, even though he had claimed he had never been to Ohio, and had "sold less that $650.00 worth of his software to only (twelve) Ohio residents" over the Internet. Without discovery, the Court would never know if defendant's sales approach those in *CompuServe*. Additionally, the only facts given before the lower court are that "MLeads does not generate any substantial (i.e., over one percent (1%)) percentage of its revenues from activities in the State of Utah." See Ct. Rec. p. 31, ¶ 16. That statement does not provide any relevant information as the percentage of revenue is certainly relative to the amount of revenue

actually brought in. One percent of a million dollars is certainly a substantial amount of revenue. As defendant is soliciting wares for one of the currently most successful areas (mortgage refinancing) of business, it could easily be assumed that the amount of revenues generated are much greater than one million dollars. That information is not available, and would not be available without discovery, which was not permitted by the lower court. It was error for the lower court not to find minimum contacts.

Even in the event the Court does not find defendant's actions to be commercial, there is also a middle category of websites, of which Courts have also found the requirements for personal jurisdiction to be fulfilled. This category is known as "interactive" website. These are websites "where a user can exchange information with the host computer." *Id.* at 1187. If the actual website maintained by the defendant is not commercial in nature, it is at least interactive, as shown by the email sent by the defendant to the plaintiff. See Ct. Rec. p. 4. As is readily discerned, just from the copy printed and provided as an exhibit for the complaint, there is an obvious offer to do business. *Id.* The entire purpose of the email is to solicit the sale of a product sold by the defendant. *Id.*

Courts have found jurisdiction over the operator of a website when not a single sale was made within the forum state. See *Starmedia Network, Inc. v. Star Media, Inc.*, 2001 U.S. Dist. LEXIS 4870 (S.D.N.Y. Apr. 23, 2001). In *Starmedia*, the court found that even though customers could not purchase products through the defendant's website, they "could register with the site and use the site to send comments to defendant." *Id.* at 1. This is similar to the

defendant's offending email. The commercial message sent solicits the sale of defendant's product through clicking on a certain area which would carry the user to the defendant's website for purchase of the product. See Ct. Rec. p. 85. The entire purpose of the message is to solicit the sale of defendant's products. *Id.*

Courts have also found personal jurisdiction appropriate where just one email was sent. A Mississippi court recently found jurisdiction from the sending of just one email. See *Internet Doorway, Inc. v. Parks*, 138 F.Supp. 773 (S.D. Miss. 2001). The court in that case subjected the defendant, who maintained a "passive" web site. to personal jurisdiction. *Id.* The court stated that "the medium in the instant case is an e-mail, which as actively sent to the recipient in hopes that the recipient would read its contents and patronize the Web site it was promoting. *Id.* at 777. The court held that the injury occurred in Mississippi, when the e-mail was received and opened. *Id.* In analyzing whether the fairness and due process rights of the defendant, the court reasoned that, in sending the e-mail advertisement all over the world, the defendant:

> "had to have been aware that the e-mail would be received and opened in numerous fora, including Mississippi. Accordingly, the Court finds that it would ne neither "unfair" nor "unjust" to subject her to personal jurisdiction in Mississippi. **By sending an e-mail solicitation to the far reaches of the earth for pecuniary gain, one does so at her own peril, and cannot then claim that it is not reasonably foreseeable that she will be haled into court in a distant jurisdiction to answer for the ramifications of that solicitation.**"

Id. at 779-80 (emphasis added). This is exactly what the defendant has done in this situation. The defendant has placed on its website, and admittedly others, to be sent to the computers

of internet users such as the plaintiff, a solicitation, that in this case was sent to the plaintiff's computer here in Utah. That solicitation would be and probably has been sent to computer terminals all over the world, including to other Internet users in Utah. It was done for pecuniary gain. Therefore, he has done it at his own peril and now "cannot then claim that it is not reasonably foreseeable that [he] will be haled into court in [Utah]." *Internet Doorway* at 780. The lower court erred in not finding sufficient minimum contacts.

Further, the lower court, in a misplaced reliance upon one statement from *First Mortgage Corp. v. State Street Bank and Trust Co.*, 173 F. Supp. 2d 1167, 1173 (D. Utah 2001), found that because the email was sent to Plaintiff's residence that Defendant had not purposefully availed itself of this State's jurisdiction. See Ct. Rec. p. 107-08, ¶¶ 18-21. In *First Mortgage,* jurisdiction was not found because the Defendant had been subjected to the State's jurisdiction by the actions of another party. *Id.* In this case, Plaintiff had no part of Defendant's actions. She was only the recipient of those actions. That was error.

B. The Exercise of Personal Jurisdiction Will Not Offend "Traditional Notions of Fair Play and Substantial Justice."

This second inquiry "requires a determination of whether the exercise of personal jurisdiction over the defendant with minimum contacts is 'reasonable' in light of the circumstances surrounding the case." *Rainy Day Books* at 1162. "This inquiry requires a determination of whether the ... court's exercise of personal jurisdiction over the defendant is reasonable in light of the circumstances surrounding the case." *Id.* at 1162 (citing *Burger King*, 471 U.S. at 476). To determine the reasonableness, the court will consider the

following factors: "(1) the burden on the defendant; (2) the forum state's interest in resolving the dispute; (3) the plaintiff's interest in receiving convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies." *World-Wide Volkswagen*, 444 U.S. at 292.

Courts have found that, in this time of Internet communications, faxes, telephones, and relatively inexpensive travel, requiring defendant to litigate in this jurisdiction is not constitutionally unreasonable. See *Rainy Day Books, supra.* In addition, just as the court in *Rainy Day Books* had a strong interest in adjudicating disputes involving infringement, the courts in Utah have a strong interest in adjudicating disputes in regard to situations like this. For this purpose, the Utah legislature saw fit to pass the statute this complaint was brought under. This forum does not appear to be more advantageous for the plaintiff, than another even though she is located here, as witnesses and evidence are to be found both in Utah and in Arizona. It does not seem unreasonable for the defendant to have to defend this suit in the location where he sent or caused to be sent defendant's spam. The lower court's decision is not in accordance with those principles and should be reversed. To adopt the court's ruling is to eviscerate the spam statute. If recipients of the spam are unable to bring actions as permitted by the statute, why have a statute. If neither the spam statute nor the State's long-arm statute provide jurisdiction, there simply is no possibility of enforcing the legislature's

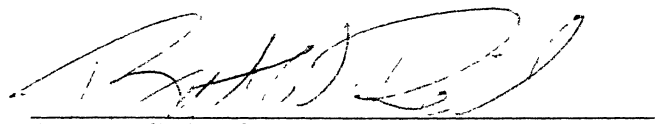
remedy for the spam problem. It is an incorrect result and cannot be the result intended by the legislature. The lower court's ruling should be reversed.

CONCLUSION

Pursuant to the foregoing arguments and law, Appellant respectfully requests this Court reverse the error made by the Third District Court in this matter and find Defendant to be properly subjected to jurisdiction in this State.

DATED this 15 day of April. 2004.

NELSON, SNUFFER, DAHLE & POULSEN



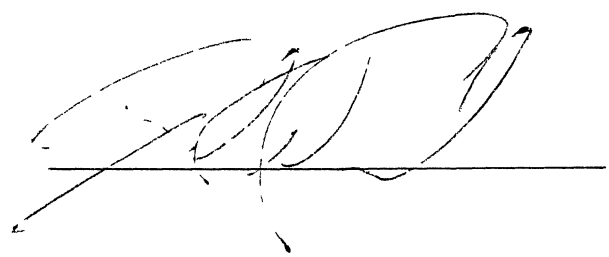
Denver C. Snuffer, Jr.
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I served two true and correct copies of the foregoing **APPELLANT'S OPENING BRIEF ON APPEAL**, via first class mail, postage prepaid, on the following:

Jill L. Dunyon (5948)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, UT 84145

on this 12 day of April, 2004.



ADDENDUM

1. Memorandum Decision and Order on Defendant MLeads's Motion to Dismiss.

2. Unsolicited Commercial and Sexually Explicit Email Act, Utah Code §§ 13-36-101 to 13-36-105 (2002).

ADDENDUM 1

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
SANDY DEPARTMENT

BRITTNEY FENN, Plaintiff,	:	
vs	:	DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS
	:	ON JURISDICTIONAL GROUNDS
MLEADS ENTERPRISES, INC., and JOHN DOES one through ten whose true names are unknown,	:	Case No. 030400108
Defendants.	:	Judge Denise Posse Lindberg

¶1 This matter is before the Court on Defendant MLEADS ENTERPRISES, Inc. ("Mleads")'s Motion to Dismiss filed April 4, 2003 Defendant brings its Motion under Utah R. Civ. Pro. 12(b)(2) asserting lack of personal jurisdiction over Defendant. Mleads' Motion is supported by an affidavit filed by Shaw Tyler ("Tyler"), founder, shareholder and corporate secretary of Mleads. Plaintiff filed his Opposition on April 16, 2003. The Opposition memorandum is not supported by affidavit. Mleads replied on April, 21, 2003 For the reasons stated below Mleads' Motion is GRANTED.

RELEVANT FACTS

¶2 Plaintiff is a Utah resident who has brought this action on behalf of herself, alleging that Mleads has violated Utah's Unsolicited Commercial and Sexually Explicit Email Act, Utah Code Ann §13-36-101 to -105 (Supp. 2002) (the "Act").

¶3 Among other things the Act requires that "[e]ach person who sends or causes to be sent an unsolicited commercial email . . to an email address held by a resident of the state shall" take certain actions to identify itself and the advertising nature of the message sent. Specifically, the Act imposes certain requirements on unsolicited commercial email messages[1] ("UCEs") and authorizes a civil cause of action for violation of the Act's requirements §13-36-105.

¶4 Plaintiff attached a printout of the alleged UCE to her Complaint. The name of Plaintiff's

[1]For example, the Act requires that senders include certain truthful information in its email, prohibits the use of certain misleading practices, and requires the sender to provide a mechanism allowing recipients to "unsubscribe" with respect to future email messages. Utah Code Ann. §13-36-103.

Plaintiff's counsel appears at the top of the printout showing that the alleged UCE was printed from the computer of Plaintiff's counsel. The printout indicates that the UCE was sent "from" "Brittney Fenn [BAF @ heartslc com]," and sent "to" "Spam Recovery (E-mail)." The printout further indicates, under the "Original Message" heading, that the original email was "from" "mleads [mailto:yoo @ yoodoohoo com]," and was sent "to" "baf @ heartslc com." The subject line reads "Very Good News." The text of the email indicates that the recipient may apply for lower interest rates. The email invites the recipient to click on a weblink, that appears in the bottom portion of the email, in order to receive a free quote. Exhibit A to Complaint.

¶5 Defendant is an Arizona Corporation. Defendant "generates leads with respect to loans to purchase property," Affidavit of Shaw Tyler, ¶2 [hereinafter "*Affidavit*"].

¶6 Tyler's Affidavit states that Defendant (a) does not maintain any offices in the State of Utah, (b) does not transact any business in the State of Utah, (c) is not licensed to do business in the State of Utah, (d) does not employ or recruit any employees or agents in Utah, (e) does not have any bank accounts in Utah, (f) does not maintain any telephone or facsimile numbers in Utah, (g) does not advertise or solicit business in Utah, (h) does not have any shareholders in Utah, (i) does not pay taxes in Utah, (j) does not generate any substantial percentage of its revenues from activities in Utah. Affidavit at ¶¶7-16.

STANDARD OF REVIEW

¶7 Under Utah law, Plaintiff must make a *prima facie* case for assertion of jurisdiction over Defendant in order to proceed to trial on the merits. *Anderson v. American Soc'y of Plastic & Reconstructive Surgeons*, 807 P.2d 825 (Utah 1990). The Court may determine jurisdiction on affidavits alone, permit discovery, or hold an evidentiary hearing. If, as here, the Court proceeds on documentary evidence alone, Plaintiff's factual allegations are accepted as true unless specifically controverted by the Defendant's affidavit. Any disputes in the documentary evidence are resolved in Plaintiff's favor, and the Court does not weigh the evidence. *Id.* at 827. *See also Hoy v. Jim's Enterprises*, 2001 UT 63 ¶6, 29 P.3d 633 (*quoting Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990)) ("[I]f there is any doubt about whether a claim should be dismissed for lack of factual basis, the issue should be resolved in favor of giving the party an opportunity to present its proof.")

¶8 In this case Plaintiff has rested on the very general factual allegations made in her Complaint. "[O]nly the well pled facts of plaintiff's complaint as distinguished from mere conclusory allegations must be accepted as true." *PurCo Fleet Serv., Inc. v. Towers*, 38 F. Supp.2d 1320, 1323 (D. Utah 1999) (*quoting Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995)(citations omitted). "[W]hen jurisdiction is challenged, plaintiff cannot solely rely on allegations of jurisdiction in its complaint in the face of an affidavit by defendant which specifically contradicts those general allegations." *Roskelley & Co. v. Lerco, Inc.*, 610 P.2d 1307 (Utah 1980). Mleads has directly controverted Plaintiff's general allegations by way of affidavit

ANALYSIS

¶9 The Complaint's sole allegation with respect to jurisdiction is that "Defendant sent, or caused to be sent, to plaintiff an unsolicited commercial e-mail," which, according to Plaintiff, establishes this Court's jurisdiction under Utah Code Ann §13-36-101 (Supp 2002) Complaint, p 3, ¶¶4-7

¶10 Plaintiff does not claim that the Court can exercise *general* personal jurisdiction over Mleads However, Plaintiff argues that by "appearing generally" to bring the present Motion, Mleads has conceded jurisdiction to this Court Opposition p 4 ¶3 Plaintiff further alleges that the Act itself, as well as Utah's long-arm statute, provide a basis for *specific* personal jurisdiction over Defendant

¶11 The Court rejects Plaintiff's "general appearance" argument In *Ted R Brown & Assocs v Carnes Corp*, 547 P.2d 206 (Utah 1976), the Utah Supreme Court made clear that Utah R Civ P.12(b) abolished the distinction between general and special appearances Mleads did not concede jurisdiction to this Court by bringing its Motion to Dismiss for lack of personal jurisdiction Rather, Rule 12(b) anticipates that multiple defenses may be raised in the same motion without waiving any of the defenses Thus, in addition to its "lack of jurisdiction over the person" defense, Mleads could properly argue other defenses without conceding jurisdiction to this Court *Barlow v Crapo*, 821 P.2d 465 (Ut App 1991), which Plaintiff cites in support of her argument, is unavailing That case involved a defendant s claim of *forum non conveniens* In a *forum non conveniens* case the moving party does not contest that the forum can appropriately exercise personal jurisdiction Rather, the claim is that there is another, similarly appropriate forum that could hear the matter, and it would be more convenient for the litigants and/or witnesses to have the matter heard in the that other forum That is not Defendant's claim in this case Rather, Defendant claims that this forum *cannot* appropriately exercise personal jurisdiction under the applicable constitutional standard

¶12 On the question whether the Court may exercise specific personal jurisdiction in this case, ' specific jurisdiction gives a court power over a defendant only with respect to claims arising out of particular activities of the defendant in the forum state " *Arguello v Industrial Woodworking Machine*, 838 P.2d 1120, 1122 (Utah 1992) The Utah Supreme Court recently clarified the law on this issue In determining whether such jurisdiction exists, this Court must first assess whether Utah law confers personal jurisdiction over the nonresident Defendant If Utah law confers such personal jurisdiction, the Court must then determine whether the assertion of jurisdiction comports with constitutional due process requirements *State ex rel W A*. 2002 UT 127 ¶ 14

¶13 The Court cannot agree with Plaintiff's contention that the Act provides for exercise of jurisdiction over nonresident defendants Unlike other provisions of Utah law in which the legislature has expressly authorized the exercise of such jurisdiction, *see e g* Utah Code Ann §78-3a-110(13), the Act is silent with respect to jurisdiction The logical inference is that the Act is limited to establishing a cause of action against those who violate its substantive requirements but only to the extent that the Court can properly exercise personal jurisdiction over such defendants

¶14 Since the Act itself does not confer jurisdiction over nonresident defendants the Court must look to Utah's long-arm statute to see if it reaches the conduct of which Plaintiff complains Utah s long-arm statute, § 78-27-24, provides, in relevant part

> Any person whether or not a citizen or resident of this state who in person or through an agent does any of the following enumerated acts submits to the jurisdiction of the courts of this state as to any claim *arising out of or related to*
>
> (1) the transaction of any business within this state,
>
> (3) the causing of any injury within this state whether tortious or by breach of warranty (emphasis added, balance of section omitted)

¶15 "[T]he words 'transaction of business within this state' mean activities of a nonresident person his agents or representatives in this state which affect persons or businesses within the state of Utah " Utah Code Ann § 78-27-23(2) (Supp 1996) "The Utah Supreme Court has applied a 'liberal and expansive construction' to the statutory definition of transacting business " *Patriot Systems Inc v C-Cubed Corp* 21 F Supp 2d 1318 1323 (D Utah 1998)(*citing Nova Mud Corp v Fletcher* 648 F Supp 1123, 1126 (D Utah 1986)) Additionally the legislature has declared that the long-arm statute should be ' applied so as to assert jurisdiction to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution " Utah Code Ann §78-27-22, *see also First Mortgage Corp v State Street Bank and Trust Co* 173 F Supp 2d 1167, 1173 (D Utah 2001)

¶16 Defendant has affirmatively claimed it does not engage in business activities within the State of Utah Plaintiff has failed to provide, by way of affidavit, any facts that would create a disputed material issue of fact regarding Plaintiff's representations of its business activities within the state Thus, the sole apparent nexus between Defendant and this state is the alleged UCE received by the Plaintiff Assuming without deciding, that the alleged UCE constitutes a "transaction of business within this state" within in the meaning of Utah's long-arm statute, the Court must determine whether sufficient "minimum contacts" exist between Defendant and this state such that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice " *International Shoe Co v Washington*, 326 U S 310 (1945)

¶17 "The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations " *Burger King Corp v Rudzewicz* 471 U S 462 473 (1985) "The minimum contacts necessary for specific personal jurisdiction are established if the defendant has purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that 'arise out of or relate to' those activities " *Soma Medical Int'l v Standard Chartered Bank* 196 F.3d 1292 1298 (10th Cir 1999) (internal citations and quotations omitted) The Court must examine the quantity and quality of contacts with the state to determine if these contacts are sufficient to support the Court's exercise of personal jurisdiction If the Court determines that there are minimum contacts between Defendant and this forum, the Court must then determine whether the cause of action arose from those contacts and, if so the Court must balance the

convenience of the parties and the interests of the State in asserting jurisdiction

¶18 The email message of which Plaintiff complains is arguably a solicitation to do business Solicitation has been recognized as "evidence suggesting purposeful availment" of the benefits provided by the forum state *Far West Capital Inc v Towne* 46 F 3d 1071, 1076 (10th Cir 1995) In his Affidavit Tyler asserts that Mleads hired a third party independent contractor to market Mleads' services to "consumers," including Plaintiff, *see* Affidavit, at 2, ¶3, and that at no time "prior to the transmission [did Mleads] learn any information regarding the locale or identity of" Plaintiff *Id* at 3, ¶4 Further, Tyler asserts that the third party marketing company did not provide any personal or contact information about Plaintiff prior to the transmission of the alleged UCE nor would have provided such information "even if requested by Mleads" *Id*

¶19 The sworn representations in the Tyler Affidavit have not been directly contraverted by Plaintiff Although the language of the Affidavit appears to be purposefully vague, the Court understands the above-referenced statements in the Tyler Affidavit, see *supra* ¶18, to mean that Mleads had no knowledge, prior to the email being sent (presumably by the intermediary marketing company), that a solicitation would be directed to a resident of this State As such, the Court concludes that this single contact should not be construed as Defendant's knowingly and purposefully availing itself of the benefits of this forum Moreover, case law indicates that "a connection with the forum *arising from the Plaintiff's place of residence*, does not satisfy the purposeful availment requirement" *First Mortgage Corp*, 173 F Supp 2d at 1174 (emphasis added), *see Omi Holdings, Inc v Royal Ins Co Of Canada*, 149 F.3d 1086, 1091 (10th Cir 1998) Since the single contact of which Plaintiff complains is grounded on fact that the email was sent to an email address held by a Utah resident, the contact arguably arises solely from Plaintiff's place of residence and, as such, does not establish purposeful availment *First Mortgage Corp* 173 F Supp 2d at 1174 On these facts the Court concludes that there are insufficient minimum contacts between Defendant and this forum to warrant exercise of personal jurisdiction over Defendant

¶20 The Court also rejects Plaintiff's final argument in support of specific personal jurisdiction, which is that Plaintiff has suffered "injury, as evidenced by the violation of the [Act]" See Opposition, at 7 Plaintiff does not elaborate on the basis for the claimed injury, but given that Plaintiff's Opposition cites generally to subsection (3) of the long-arm statute ("the causing of any injury within this state whether tortious or by breach of warranty") Utah Code Ann §78-27-24(3), the Court infers that Plaintiff is claiming some sort of tort-based injury[2]

¶21 Even if the Court were to accept that the email at issue here is a UCE under the Act, nothing in the Act's plain language comes close to suggesting that receiving a UCE constitutes a tort-based injury *See e g Goff v Carrot Bunch*, Civ 020411292 (3rd Dist Utah, April 18 2002) (Utah's Act does not recognize any level of "injury" on the part of the recipient of an email, rather it merely requires the initiator of such an email to comply with statutory requirements or face civil penalties) *Cf Prince v Bear River Mut Ins* 2002 UT 68 ¶47 ("Where a statute provides a specific civil legal remedy to redress an injury in violation of that

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[2]Nothing in Plaintiff's Complaint or Opposition can be reasonably construed as stating a claim based on "breach of warranty"

statute, a tort action for violation of the public policy embodied in the statute will not lie")

ORDER

¶22 Defendant's Motion to Dismiss for lack of personal jurisdiction is GRANTED Defendant's counsel to prepare and submit proposed Order IT IS SO ORDERED

Entered this 26th day of September, 2003, by the Court

Denise Posse Lindberg, Third District Court Judge

3RD DISTRICT COURT - SANDY COURT
SALT LAKE COUNTY, STATE OF UTAH

BRITTNEY FENN, Plaintiff,	:	MINUTE ENTRY
vs.	:	Case No: 030400108
MLEADS ENTERPRISES INC, Defendant.	:	Judge: DENISE P. LINDBERG Date: 09/26/2003

Clerk: lisam

Defendant's Motion to Dismiss for lack of persoal jurisdiction is GRANTED. Defendant's counsel to prepare and submit proposed Order. IT IS SO ORDERED.

Case No: 030400108
Date: Oct 14, 2003

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 030400108 by the method and on the date specified.

METHOD	NAME
Mail	JILL L DUNYON ATTORNEY DEF #10 EXCHANGE PLACE SUITE 400 SALT LAKE CITY, UT 84111
Mail	DENVER C SNUFFER ATTORNEY PLA 10885 SOUTH STATE STREET SANDY UT 84047

Dated this 15 day of October, 2003.

Deputy Court Clerk

ADDENDUM 2

5) whether the franchisees of the same line make in that relevant market area are providing adequate service to consumers for the powersport vehicles of the line-make which shall include the adequacy of the powersport vehicle sale and service facilities equipment supply of vehicle parts and qualified service personne 2002

13-35-307 Franchisor's repurchase obligations upon termination or noncontinuation of franchise

1) Upon the termination or noncontinuation of a franchise by the franchisor the franchisor shall pay the franchisee

(a) the franchisee's cost of new undamaged and unsold powersport vehicles in the franchisee's inventory acquired from the franchisor or another franchisee of the same line-make representing both the current model year at the time of termination or noncontinuation and the immediately prior model year vehicles

i) plus any charges made by the franchisor or distribution delivery or taxes

ii) plus the franchisee's cost of any accessories added on the vehicle shall be repurchased and

(iii) less all allowances paid or credited to the franchisee by the franchisor

(b) the cost of all new undamaged and unsold supplies parts and accessories as set forth in the franchisor's catalog at the time of termination or noncontinuation for the supplies parts and accessories less all allowances paid or credited to the franchisee by the franchisor

(c the fair market value but not less than the franchisee's depreciated acquisition cost of each undamaged sign owned by the franchisee that bears a common name trade name or trademark of the franchisor if acquisition of the sign was recommended or required by the franchisor If a franchisee has a sign with multiple manufacturers listed the franchisor is only responsible for its pro rata portion of the sign

(d) the fair market value but not less than the franchisee's depreciated acquisition cost of all special tools equipment and furnishings acquired from the franchisor or sources approved by the franchisor that were recommended or required by the franchisor and are in good and usable condition and

(e) the cost of transporting handling, packing, and loading powersport vehicles, supplies parts accessories signs special tools equipment and furnishings

(2) The franchisor shall pay the franchisee the amounts specified in Subsection 1) within 90 days after the tender of the property to the franchisor if the franchisee

(a) has clear title to the property and

(b) is in a position to convey title to the franchisor

(3) If repurchased inventory and equipment are subject to a security interest the franchisor may make payment jointly to the franchisee and to the holder of the security interest 2002

CHAPTER 36

UNSOLICITED COMMERCIAL AND SEXUALLY EXPLICIT EMAIL ACT

13-36-101. Title.

This chapter is known as the "Unsolicited Commercial and Sexually Explicit Email Act." 2002

13-36-102 Definitions

As used in this chapter

1 "Commercial" means for the purpose of promoting the sale lease or exchange of goods services or real property

2) Computer network means two or more computers that are interconnected to exchange electronic messages files data or other information

3 "Email means an electronic message file data or other information that is transmitted

(a) between two or more computers computer networks or electronic terminals or

b) within a computer network

(4) "Email address means a destination commonly expressed as a string of characters to which email may be sent or delivered

5) Email service provider means a person that

(a) is an intermediary in the transmission of email from the sender to the recipient or

(b) provides to end users of email service the ability to send and receive email

(6) "Internet domain name means a globally unique hierarchical reference to an Internet host or service assigned through centralized Internet authorities comprising a series of character strings separated by periods with the right most string specifying the top of the hierarchy

(7) a) "Sexually explicit email" means an email that contains promotes or contains an electronic link to material that is harmful to minors as defined in Section 76-10-1201

(b) An email is a "sexually explicit email" if it meets the definition in Subsection (7)(a) even if the email also meets the definition of a commercial email

(8) (a "Unsolicited means without the recipient's express permission except as provided in Subsection (8)(b)

(b) A commercial email is not "unsolicited" if the sender has a preexisting business or personal relationship with the recipient 2002

13-36-103. Unsolicited commercial or sexually explicit email — Requirements.

(1 Each person who sends or causes to be sent an unsolicited commercial email or an unsolicited sexually explicit email through the intermediary of an email service provider located in the state or to an email address held by a resident of the state shall

(a) conspicuously state in the email the sender's

(i) legal name

(ii) correct street address and

(iii) valid Internet domain name

(b) include in the email a subject line that contains

(i) for a commercial email, "ADV" as the first four characters or

(ii) for a sexually explicit email "ADV:ADULT" as the first nine characters

(c) provide the recipient a convenient no-cost mechanism to notify the sender not to send any future email to the recipient including

(i) return email to a valid functioning return electronic address and

(ii) for a sexually explicit email and if the sender has a toll-free telephone number the sender's toll-free telephone number and

(d) conspicuously provide in the text of the email a notice that

(i) informs the recipient that the recipient may conveniently and at no cost be excluded from future

commercial or sexually explicit email as the case may be from the sender and

(ii) for a sexually explicit email and if the sender has a toll-free telephone number includes the sender's valid toll free telephone number that the recipient may call to be excluded from future email from the sender

A person who sends or causes to be sent an unsolicited mercial email or an unsolicited sexually explicit email ugh the intermediary of an email service provider located e state or to an email address held by a resident of the may not

(a) use a third party's Internet domain name in identifying the point of origin or in stating the transmission path of the email without the third party's consent

(b) misrepresent any information in identifying the point of origin or the transmission path of the email or

(c) fail to include in the email the information necessary to identify the point of origin of the email

If the recipient of an unsolicited commercial email or an licited sexually explicit email notifies the sender that the ient does not want to receive future commercial email or re sexually explicit email respectively from the sender sender may not send that recipient a commercial email or xually explicit email as the case may be either directly or ugh a subsidiary or affiliate 2002

6-104. Criminal penalty.

A person who violates any requirement of Section 13-03 with respect to an unsolicited sexually explicit email is ty of a class B misdemeanor

) A criminal conviction or a penalty assessed as a result of minal conviction under Subsection (1) does not relieve the son convicted or assessed from civil liability in an action ler Section 13-36-105 2002

36-105. Civil action for violation — Election on damages — Costs and attorney fees — Defense

1) For any violation of a provision of Section 13-36-103 an ion may be brought by

(a) a person who received the unsolicited commercial email or unsolicited sexually explicit email with respect to which the violation under Section 13-36-103 occurred or

(b) an email service provider through whose facilities the unsolicited commercial email or unsolicited sexually explicit email was transmitted

2) In each action under Subsection (1)

(a) a recipient or email service provider may

(i) recover actual damages or

(ii) elect in lieu of actual damages to recover the lesser of

(A $10 per unsolicited commercial email or unsolicited sexually explicit email received by the recipient or transmitted through the email service provider or

(B) $25 000 per day that the violation occurs and

(b) each prevailing recipient or email service provider shall be awarded costs and reasonable attorney fees

(3) An email service provider does not violate Section 13-36-103 solely by being an intermediary between the sender and recipient in the transmission of an email that violates that section

(4) The violation of Section 13-36-103 by an employee does not subject the employee's employer to liability under that section if the employee's violation of Section 13-36-103 is also a violation of an established policy of the employer that requires compliance with the requirements of Section 13-36-103

(5) It is a defense to an action brought under this section that the unsolicited commercial email or unsolicited sexually explicit email was transmitted accidentally 2002

CHAPTER 37

NOTICE OF INTENT TO SELL NONPUBLIC PERSONAL INFORMATION ACT [EFFECTIVE JANUARY 1, 2004]

Part 1

General Provisions [Effective January 1, 2004]

Part 2

Notice of Disclosure [Effective January 1, 2004]

PART 1

GENERAL PROVISIONS [EFFECTIVE JANUARY 1, 2004]

13-37-101. Title [Effective January 1, 2004].

This chapter is known as the "Notice of Intent to Sell Nonpublic Personal Information Act" 2003

13-37-102 Definitions [Effective January 1, 2004]

As used in this chapter

(1) "Affiliate" means a person that controls is controlled by, or is under common control with

(a) a commercial entity and

(b) (i) directly or

(ii) indirectly through one or more intermediaries

(2) (a) Subject to Subsection (2)(b) "commercial entity" means a person that

(i) has an office or other place of business located in the state and

(ii) in the ordinary course of business transacts a consumer transaction in this state

(b) "Commercial entity" does not include

(i) a governmental entity or

(ii) an entity providing services on behalf of a governmental entity

(3) "Compensation" means anything of economic value that is paid or transferred to a commercial entity for or in direct consideration of the disclosure of nonpublic personal information

(4) (a) "Consumer transaction" means

(i) a sale lease assignment award by chance or other written or oral transfer or disposition

(A) that is initiated or completed in this state and

(B) of

(I) goods

(II) services or

(III) other tangible or intangible property except securities and insurance or services related thereto or